FILED
DEC 6
JOSEPH F

NO. 89-450

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TEXAS MEDICAL ASSOCIATION, et al.,
Petitioners,

v.

LOUIS W. SULLIVAN, M.D., SECRETARY OF HEALTH AND HUMAN SERVICES, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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The Texas Medical Association and other Texas Physicians' organizations, physicians, and Medicare beneficiaries named as parties hereby file their Reply Brief to address arguments first raised in the briefs in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit ("Petition for Certiorari").

OPINIONS BELOW

The order of the district court, dated November 2, 1987, granting preliminary injunction, is reported at 678 F.Supp. 643 (W.D. Tex. 1987). The Supplemental Order of the district court, dated January 8, 1988, containing the findings of fact and conclusions of law in support of the preliminary injunction is unreported. The opinion of the court of appeals dated June 27, 1989 is reported at 875 F.2d 1160 (5th Cir. 1989).

JURISDICTION

The court of appeals entered its judgment on June 27, 1989, denied Petitioners' Petition for Rehearing on July 27, 1989, and denied Petitioners' Motion for Leave to File Motion for Reconsideration on October 2, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

42 U.S.C. § 1395ff (1983 & Supp. 1989), 42 U.S.C. § 1395gg(c) (1983 & Supp. 1989), 42 U.S.C. § 1395pp (1983 & Supp. 1989), 42 C.F.R. § 405.860 (1989). Also involved and reproduced in Appendix G to the Petition for Certiorari are Medicare Carriers Manual ("Manual") § 12016A and Manual §§ 7102 and 7103.1A as amended by Manual Transmittal No. 1316 (July 1989).

STATEMENT OF THE CASE

Petitioners have filed their Petition for Certiorari. Their Statement of the Case, found on pages 2-11 of the Petition for Certiorari, is incorporated herein.

ARGUMENT

A. THE 1986 AMENDMENT TO SECTION 1395ff DOES NOT DIMINISH THE IMPORTANCE OF THIS COURT'S REVIEW OF THE SCOPE OF THE JUDICIAL REVIEW LIMITATION OF SECTION 1395ff.

Respondent Secretary of Health and Human Services ("Secretary") argues that, in light of Congress' intervening amendment[1] to 42 U.S.C. § 1395ff (1983 & Supp. 1989) ("Section 1395ff"), the jurisdictional holding of the court of appeals presents no issue of continuing importance that warrants review by this Court. Brief for the Federal Respondent in Opposition ("Br. for Fed. Resp. in Opp.") at 8. This argument ignores the facts that the 1986 amendment to Section 1395ff (1) only partially relaxed the preexisting limitation to judicial review of Part B matters and (2) did not affect the preexisting limitation to judicial review of Part A matters. Further, this argument is an attempt to use the amendment *expanding* the scope of judicial review to *deprive* Petitioners of review.

Before the 1986 amendment, Section 1395ff barred judicial review of (1) determinations of the amount of Medicare Part B benefits and (2) determinations of the amount of Medicare Part A benefits in which the amount in controversy was less than $1,000. The 1986 amendment made the availability of judicial review of the amount of Part B determinations parallel with Part A determinations. This Court, in *Michigan Academy*, did not concern itself with amount determinations but held, regardless of the amount in controversy, that the Secretary's regulations

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1. *See* Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9341(a), 100 Stat. 2037-2038.

and instructions, including those establishing the method by which the amount of benefits is to be determined, are judicially reviewable. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986). Thus, *Michigan Academy* is still important in determining whether a court may review a Medicare matter where the amount in controversy is less than $1,000. The *Michigan Academy* "method" distinction has recently been relied upon as permitting judicial review of both Part A and Part B matters where the amount in controversy was less than $1,000, but where a regulation or instruction of the Secretary was challenged. *See, e.g., McCuin v. Secretary of Health and Human Services*, 817 F.2d 161 (1st Cir. 1987); *Goodman v. Sullivan*, 712 F.Supp. 334 (S.D. N.Y. 1989).

It should be remembered that the majority of the claims presented by Petitioners involve an amount in controversy of less than $1,000. Individually, such claims may not be expected to generate litigation, but where, as here, thousands of such claims arise directly from policy decisions by the Secretary, they can be expected to provoke class action litigation.

Finally, the Secretary's primary argument based on the 1986 amendment is actually no more than an admission that, under the current legislation, the subject conduct could not escape judicial review—so this Court should ignore his past errors and let them lie, unrelieved, because the jurisdictional "problem" has been "fixed." This is scant consolation to the thousands of claimants represented by Petitioners whose claims the Secretary does *not* want to have judicially reviewed. It is also inconsistent with the Congressional intent manifest in the 1986 amendment, which went beyond *Michigan Academy* in granting

judicial review for *all* Part B claims in excess of $1,000, while still leaving open the possibility of such review for smaller claims[2] under the *Michigan Academy* standard. While the legislation was not explicitly retroactive, it was a clear Congressional endorsement of this Court's ruling in *Michigan Academy* that preclusion statutes are to be narrowly construed; Congress favors judicial review in substantial and significant cases, including those under Part B of the Medicare program. Respondent's position distorts the intent of Congress into a reason to deny judicial review for a large dispute that involves policy instructions by the Secretary involving thousands of people and millions of dollars. That is clearly not what Congress intended.

Petitioners submit that the scope of the preclusion of judicial review contained in Section 1395ff is of continuing importance warranting review by this Court, despite the intervening 1986 amendment to Section 1395ff.

B. AN INSTRUCTION NEED NOT BE "OFFICIALLY ISSUED" BY THE SECRETARY TO HAVE A BINDING EFFECT ON HEARING OFFICERS AND TO BE SUBJECT TO JUDICIAL REVIEW.

Respondent Blue Cross and Blue Shield of Texas, Inc. ("Blue Cross") argues that an instruction should be one "officially issued" by the Secretary in order to be subject to judicial review. Blue Cross' Brief in Opposition ("Br. in Opp.") at 19 n.4. Respondent does not define what constitutes an official issuance or provide guidance as to how a hearing officer or carrier might distinguish a

2. As noted above, the claims underlying this Petion for Certiorari include a majority under $1,000, but a substantial number in excess of $1,000. Petitioners seek aggregation of all these commonly-derived claims before the court in a class action.

Health Care Financing Administration official's casual directive from a policy statement or other guide that is binding pursuant to regulation. This argument would improperly narrow the scope of judicial review of the "Secretary's instructions and regulations" authorized in *Michigan Academy*.

The consequence of Respondent Blue Cross' attempt to limit judicial review to only those instructions "officially issued" by the Secretary can only be to encourage the Secretary to run the Medicare Part B program by fiat, by oral dictate, by indirect-but-well-understood "suggestion," by winks and nods that cannot be accorded the dignity the court of appeals or Respondents would find in the term "instructions." If carriers were to stick on point of principle, and demand that they "see it in writing" before acting affirmatively on such instructions, then judicially reviewable actions might occur. Realistically, a carrier looking to renewal of its contract, or just to harmony in its dealings with the Secretary, is not going to be so punctilious about the form in which it receives its instructions. It will do as it is told—as the carrier did here—and need not worry that either its own actions or those of the Secretary will be subject to judicial review.

It is the instant type of *unofficially* issued instructions that most urgently require judicial review. Officially promulgated regulations at least are subject to publication and to public comment. It is exactly the intant type of secret, informal actions taken by the Executive Branch of the United States Government against the citizens that should be redressable in court. *Michigan Academy's* global, unqualified use of the term "the Secretary's instructions" should not be subdivided and weakened as attempted by Respondents and the court of appeals. If the government directs its

agent to take action against an individual, it should be no bar to review that the direction was given unofficially. Had this Court meant to qualify the term, it could easily have done so. Petitioners respectfully urge that this Court reject Respondent's effort to limit the type of "instructions" subject to judicial review under *Michigan Academy*.

C. RESPONDENTS' ARGUMENTS CONCERNING THE IRRELEVANCE OF THE SECRETARY'S RECENT AMENDMENTS TO MANUAL §§ 7102 and 7103.1A ARE MERITLESS.

Respondents argue that the Secretary's recent amendments to Manual §§ 7102 and 7103.1A, via Manual Transmittal No. 1316 (July 1989), are irrelevant to this case since (1) the Secretary's "issuance of these revisions, which are of general applicability, was unrelated to this case" (Br. for Fed. Resp. in Opp. at 11 n.5) and (2) the "Petitioners do not challenge the validity of either the standard to be applied nor [sic] the recent change" (Br. in Opp. at 20-21 n.5). Petitioners submit that such arguments are meritless and misplaced.

As included within Petitioners' district court pleadings and argued below, Petitioners challenge the validity of the Secretary's instruction to the carrier to reopen and recoup the alleged overpayments without prior consideration of the "without fault" provision of 42 U.S.C. § 1395gg(c) (1983 & Supp. 1989). Further, Petitioners have argued that the Secretary's instructions, characterizing the carriers' use of statewide fees as illegal and resulting in an incorrect reasonable charge determination, have removed the "without fault" issue from the unfettered discretion of a hearing officer.

If there was any doubt at the time of the court of appeals' consideration of this issue that the Secretary has issued "hell or high water" instructions binding on a hearing officer regarding the "without fault" issue, such doubt was dispelled by the issuance of the new "without fault" instructions, via Manual Transmittal No. 1316 (July 1989). Sections 7102 and 1703.1A of the Manual were amended to *totally* foreclose hearing officer consideration of the "without fault" provision in situations where alleged overpayments to physicians resulted from "clerical or computer error" (Manual § 7102) or "excess payment based on an incorrect reasonable charge" (Manual § 7103.1A). In such situations, the Manual now instructs the carrier and the hearing officer that "fault is not an issue" for consideration (Manual § 7102) and that "[i]n any case, the physician is liable for any amount paid him which was more than the correct amount" (Manual § 7103.1A). Petitioners challenge such instructions as inconsistent with 42 U.S.C. § 1395gg(c).[3]

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3. The Secretary's attempt to improperly limit the scope of 42 U.S.C. § 1395gg(c) is specifically reflected in the July 1989 Manual amendment where the Secretary states:

> There are very limited situations where § 1870 of the Act [42 U.S.C. § 1395gg] will be applicable; *without fault* will primarily involve § 1879 of the Act [42 U.S.C. § 1395pp], coverage-type determinations.

Manual § 7102. The Secretary's effort to construe 42 U.S.C. § 1395gg as coterminous with 42 U.S.C. § 1395pp, is inconsistent with the unambiguous language of the respective statutes and fails to honor venerable rules of statutory construction including the rules that (1) two statutes are presumed to effect different ends and neither should be construed to make the other insignificant or ineffective; (2) a statute should not be construed in such a way as to render certain provisions superfluous or insignificant; and (3) where two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. *Netherlands Shipmortgage Corp., Ltd. v. Madias*, 717 F.2d 731, 733-34 (2nd Cir. 1983); *Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966, 971 (5th Cir. 1981); *Ruckelshaus v. Monsanto Company*, 467 U.S. 986, 1020 (1984).

Respondents' arguments that the amendments to Manual §§ 7102 and 7103.1A "are of general applicability" and that their issuance "was unrelated to this case" are themselves irrelevant. New instructions that remove the "without fault" provision from the scope of hearing officer consideration are subject to judicial review regardless of whether such instructions are of general or special applicability or whether issued in a manner related or unrelated to this case.

CONCLUSION

For the reasons stated herein and in Petitioners' Petition for Certiorari, Petitioners respectfully pray that their Petition for Certiorari be granted and that the decision of the court of appeals be reversed and the case remanded to the district court.

Respectfully submitted,

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